FOR ARGUMENT

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Supreme Court of the United States

October Term, 1976

No. 76-357

LINMARK ASSOCIATES, INC. and
WILLIAM MELLMAN,
Petitioners,

vs

THE TOWNSHIP OF WILLINGBORO and
GERALD DALY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE HOUSING ADVOCATES, INC. AS AMICUS CURIAE

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TABLE OF CONTENTS

Table of Authorities II
Interest of Amicus Curiae 1
Brief of The Housing Advocates, Inc. As Amicus Curiae 5
Argument 5

I. Introduction 5
II. A National Policy Toward Securing a Racially Balanced and Integrated Society Supports Regulation of For-Sale-Sign Proliferation by Local Government 7
III. For-Sale-Sign Regulation Does Not Restrict Constitutionally Protected Speech 13
IV. For-Sale-Sign Proliferation Limitations Are an Essential Element in Maintaining Racial Balance 15

Conclusion 18

Acknowledgments for assistance are given to Cheryll Stewart and Amy Robertson, legal interns at The Housing Advocates, Inc.

TABLE OF AUTHORITIES

Cases

Austin Independent School District v. United States, 97 S. Ct. 517, 519 (1977) 5

Banks v. Perk, 341 F. Supp. 1175, 1185 (N.D. Ohio 1972), *aff'd in relevant part*, 473 F.2d 910 (6th Cir. 1973) 12

Barrick Realty v. City of Gary, 354 F. Supp. 126, 135-136 (N.D. Ind. 1973) 17

Barrick Realty v. City of Gary, 491 F.2d 161 (7th Cir. 1974) 16

Bigelow v. Commonwealth of Virginia, 421 U.S. 809 (1975) 14, 15

Boraas v. Village of Belle Terre, 416 U.S. 1 (1974) 6, 12

Clark v. Universal Builders, Inc., 501 F.2d 324 (7th Cir. 1974), *cert. denied*, 95 S. Ct. 657 (1974) 11

Cornelius v. City of Parma, 374 F. Supp. 730 (N.D. Ohio 1974), *rev'd on other grounds*, 521 F.2d 1401 (6th Cir. 1975), *cert. denied*, 424 U.S. 996 (1976) 2, 8, 15

Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 2, 12, 14

Fair Housing Council of Bergen County v. Eastern Bergen County Multiple Listing Service, P-H E.O.H. Rptr. ¶13,786, at 14,924 (D. N.J. 1976) 8-9

Gautreaux v. Chicago Housing Authority, 503 F.2d 930, 938 (7th Cir. 1974), *aff'd sub nom. Hills v. Gautreaux*, 425 U.S. 284 (1976) 8

Heights Community Congress v. Rosenblatt Realty, Inc., *Inc.*, P-H E.O.H. Rptr. ¶13,702 (N.D. Ohio 1975) ..2, 8, 18

Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) 11

Lane v. Wilson, 307 U.S. 268, 275 (1939) 11

Linmark Associates, Inc. v. Township of Willingboro, P-H E.O.H. Rptr. ¶13,754 (3rd Cir. 1976) 13, 14, 15

McGowan v. Maryland, 220 U.S. 420, 426 (1961) 6

Shapiro v. Thompson, 394 U.S. 618 (1969) 6

State of Alabama v. United States, 304 F.2d 583, 586 (5th Cir. 1962), *aff'd* 371 U.S. 37 (1962) 11-12

Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972) 7, 8, 9, 10, 11, 17, 18

United States v. Bob Lawrence Realty, 474 F.2d 115 (5th Cir. 1973), *cert. denied*, 414 U.S. 826 (1973), *reh. denied*, 414 U.S. 1087 (1973) 15

United States v. Hunter, 459 F.2d 205 (4th Cir. 1972), *cert. denied*, 409 U.S. 934 (1972) 15

United States v. Mitchell, 327 F. Supp. 476 (N.D. Ga. 1971) 12

Valentine v. Chrestensen, 316 U.S. 52 (1942) 14

Village of Arlington Heights v. Metropolitan Housing Development Corp., No. 75-616, 42 U.S.L.W. 4073 (January 11, 1977) 12, 13

Village of Park Forest v. Fairfax Realty, P-H E.O.H. Rptr. ¶13,784, at 14,905 (N.D. Ill. 1976) 9

Weathers v. Peters Realty Corp., 499 F.2d 1197 (6th Cir. 1974) 2, 8

Zuch v. Hussey, 394 F. Supp. 1028, 1047 (E.D. Mich. 1975) 17

Statutes

42 U.S.C. §3601 6

42 U.S.C. §3604 15

42 U.S.C. §3615 10

42 U.S.C. §§5301, *et seq.* 18

Miscellany

114 CONG. REC. H9559 (Daily Ed. April 10, 1968) 10

Kinoy, *The Constitutional Right of Negro Freedom Revisited: Some First Thoughts on Jones v. Alfred H. Mayer Company*, 22 RUTGERS L. REV. 537, 551 (1968) 16

NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT 225 (1968) 18

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INTEREST OF AMICUS CURIAE

Pursuant to Rules 42(2) and 42(3) of the Supreme Court of the United States, The Housing Advocates, Inc. written consent of the petitioners and respondents has been secured and consent letters are being forwarded to the Clerk of the Supreme Court.

The Housing Advocates, Inc. is a private non-profit, tax exempt corporation based in Cleveland, Ohio and organized under the laws of Ohio for the purpose of assisting in the achievement of equal housing opportunities. The

corporation maintains a board of prominent civic leaders and a staff of lawyers and planners involved in comprehensive planning, education, publication and enforcement efforts under the Federal Fair Housing Act. Staff lawyers have participated individually in significant local and national equal housing and zoning litigaton, both as counsel and as *amicus curiae*, including *Weathers v. Peters Realty Corp.*, 499 F.2d 1197 (6th Cir. 1974); *Cornelius v. City of Parma*, 374 F. Supp. 730 (N.D. Ohio 1974), *rev'd on other grounds*, 521 F.2d 1401 (6th Cir. 1975), *cert. denied*, 424 U.S. 996 (1976); *Heights Community Congress v. Rosenblatt Realty, Inc.*, P-H E.O.H. Rptr. ¶13,702 (N.D. Ohio 1975); *Construction Industries Association v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 96 S.Ct. 1148 (1976) (*amicus curiae*); *Forest City Enterprises v. City of Eastlake*, 41 Ohio St. 2d 187 (1975) (*amicus curiae*), *rev'd*, 96 S.Ct. 2358 (1976); *Warner v. Perrino*, P-H E.O.H. Rptr. ¶13,717 (N.D. Ohio 1975); *Tokaji v. Toth*, P-H E.O.H. Rptr. ¶13,679 (N.D. Ohio 1974). Recent publications by staff include Friedman, *Federal Fair Housing Practice*, 20 A.L.I. PRAC. LAWYER 15 (December, 1974), *cited at* 11 HARV. CIV. RTS.-CIV. LIB. L. REV. at 138 (1976), and Kramer, *Promises, Promises: A New Day For Open Housing*, 21 N.Y. L. FORUM 537 (1976).

The Housing Advocates, Inc. predicates its interest on its experience in observing and addressing the factors directly related to combatting the ghettoization of racially transitional communities in the Greater Cleveland and other areas on behalf of community organizations. *Amicus curiae* has concluded that limitation of for-sale-sign proliferation, while concurrently permitting the use of other means to promote housing sales, has been a primary contributor to minimizing the resegregation of racially changing areas.

In support of its application for leave to file its brief *amicus curiae*, The Housing Advocates, Inc. provides legal representation to numbers of community organizations comprised of black and white citizens whose interests in the outcome of this litigation have not been adequately represented by the respondents nor by the petitioners. Among the citizens organizations supporting *amicus curiae* are Coventry Neighbors, Inc., Oxford Neighbors, and the Heights Community Congress, organizations of citizens whose priorities are geared to the interracial stability and harmony of their neighborhoods. While the respondents' brief will reflect a governmental perspective, the consideration of citizens' perspectives will be relevant to this Court's disposition of the case.

Accordingly, we respectfully urge this Court to affirm the action by the United States Court of Appeals for the Third Circuit in upholding the constitutionality of Willingboro's ordinance.

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BRIEF OF THE HOUSING ADVOCATES, INC. AS AMICUS CURIAE

ARGUMENT

I. Introduction

This case tests the vitality of local governmental efforts to minimize racial imbalance. "The principal cause of racial and ethnic imbalance . . . across the country . . . is the imbalance of residential patterns." *Austin Independent School District v. United States*, 97 S. Ct. 517, 519 (1977).

The standard of judicial deference to local governmental decision-making has been an axiom established by this Court for over fifty years. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Boraas v. Village of Belle Terre*, 416 U.S. 1 (1974). The establishment of a rational basis for the enactment of an ordinance, in the absence of a showing of constitutional infringement, is sufficient in supporting its validity. *McGowan v. Maryland*, 220 U.S. 420, 426 (1961). If a right which can be classified as "fundamental" is shown, legislation will be struck down if unsupported by a compelling governmental interest. *Shapiro v. Thompson*, 394 U.S. 618 (1969). Willingboro's ordinance far exceeds a conventional rational basis. Its ordinance is not only designed to promote its interracial constituents' health, morals, welfare, safety and aesthetics, it is critical to them. Similar ordinances in other racially changing communities in America are likewise. Where local governmental action is exercised, the individual's right must give way to the particular concern of the community. *Belle Terre, supra.* The "particular concern" of Willingboro and of comparable communities is the perpetuation of a residential living scheme inherent in American democratic principles: balanced and integrated harmonious neighborhoods.

Black and white citizens in Willingboro and throughout the United States seek to maintain the emerging benefits of a national policy toward equal housing opportunities. Indeed, "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. §3601. The Housing Advocates, Inc., as *amicus curiae*, believes that Willingboro is achieving this policy within constitutional limitations.

II. A National Policy Toward Securing a Racially Balanced and Integrated Society Supports Regulation of For-Sale-Sign Proliferation by Local Government

This Court's seminal pronouncement in *Trafficante v. Metropolitan Life Insurance Company*, 409 U.S. 205 (1972) recognized with candor "[t]he enormity of the task of assuring fair housing" in America. This Court acknowledges that "HUD has no power of enforcement" and further that "[t]he role of the Attorney General [has been] minimal." *Id.* at 211. Indeed, this Court focused on the reality of making fair housing a reachable goal:

> It serves an important role in this part of the Civil Rights Act of 1968 in protecting not only those against whom a discrimination is directed but also those whose complaint . . . affects 'the very quality of their daily lives.' *Shannon v. Depart. of Housing & Urban Dev.*, 436 F.2d 89.

Yet, notwithstanding the difficulties inherent in fair housing enforcement, this Court proclaimed fair housing to be a "policy that Congress considered to be of the highest priority." *Id.* at 211.

While *Trafficante* dealt with racial discrimination alleged in a large apartment complex, its rationale has been applied in the challenge of housing bias in the public context:

> The Fair Housing Act is a comprehensive legislative effort designed to remedy a pressing social need. As recognized in *Trafficante*, Congress intended by its broad definition of 'persons aggrieved' in the Fair Housing Act, to enable all persons to redress injury to the right of interracial associations
>
> • • • • •

> Accordingly, it would not be an illogical extension of *Trafficante*, and well within its spirit, to rule that white residents of a city like Parma . . . could [also] challenge, under the Fair Housing Act, any purported racially exclusionary activity pursued by the City.

Cornelius v. City of Parma, 374 F. Supp. 730, 743 and 741 (N.D. Ohio 1974), *rev'd on other grounds*, 521 F.2d 1401 (6th Cir. 1975), *cert. denied*, 424 U.S. 996 (1976).

Perhaps more than in any metropolitan area in the United States, housing bias in the Greater Cleveland area has been characterized by one federal appeals court as "aggravated." *Gautreaux v. Chicago Housing Authority*, 503 F.2d 930, 938 (7th Cir. 1974), *aff'd sub nom. Hills v. Gautreaux*, 425 U.S. 284 (1976). The pressure on racially integrated Cleveland suburbs, such as Cleveland Heights, is particularly acute. Cf. *Weathers v. Peters Realty Corp.*, 499 F.2d 1197 (6th Cir. 1974) and has required the involvement of community organizations of black and white citizens challenging housing discrimination which interferes with their fundamental right of interracial associations. *Heights Community Congress v. Rosenblatt Realty, Inc.*, P-H E.O.H. Rptr. ¶13,702 (N.D. Ohio 1975). From the viewpoint of such citizen groups, we believe the coordinated effort to combat housing bias with the aid of local government through for-sale-sign proliferation regulation has helped to defuse the mounting pressures of racial resegregation in racially balanced neighborhoods.

In part because of this and consistent with the *Trafficante* rationale, it is not surprising that courts now uniformly provide a judicial forum to organizations of black and white citizens who seek to stem the ravages of racially discriminatory housing practices such as blockbusting and racial steering. In another New Jersey case, *Fair Housing*

Council of Bergen County v. Eastern Bergen County Multiple Listing Service, P-H E.O.H. Rptr. ¶13,786, at 14,924 (D. N.J. 1976), the court wrote:

> The Fair Housing Council may, however, establish standing as the representative of those of its [black and white] members who have been injured in fact. . . . In this case, the interests of the organization and the individual plaintiffs are not only sufficiently close, they coincide. Both seek to be free from discriminatory practices by multiple listing services and real estate brokers.

The evolution of the racially transitional community itself as a fair housing advocate has now become necessary to insure that the objectives of a policy toward equal housing opportunities can be met. Recently, one court granted standing to two suburban Chicago cities seeking to challenge alleged racially resegregative conduct by realty firms. The *Trafficante* logic directed recognition that the communities themselves have evolved as "persons aggrieved" in attempting to maintain racial stability:

> The Village of Park Forest and Park Forest South are bringing this action on their own behalf and on behalf of their residents. They charge the defendants with illegally manipulating the housing market to the 'economic and social detriment of their citizens.' They further allege that because of defendants' practices their residents 'have been and will be deprived of social and professional benefits of living in an integrated society.'

Village of Park Forest v. Fairfax Realty, P-H E.O.H. Rptr. ¶13,784, at 14,905 (N.D. Ill. 1976).

Scrutiny of the Congressional history of the Fair Housing Act which dictates our nation's commitment to combat segregated housing lends support to the argument that local efforts standing alone cannot solve the pervasiveness of housing bias. Without a comprehensive federal fair housing law, argued House Judiciary Chairman Emmanuel Celler, a network of state and local equal housing laws was simply not enough.

> [T]oday, some 22 number of municipalities have enacted fair housing laws prohibiting discrimination in private housing transactions, but nevertheless, it is plain that the *combined* efforts of State and local laws, Executive orders, as well as actions by private volunteer groups is just not enough. Court decisions are not enough. Federal legislation to eliminate the blight of segregated housing and the pale of the ghetto is demanded. [Emphasis added].

114 CONG. REC. H9559 (Daily Ed. April 10, 1968) Chairman Celler's comment during the debate of Title VIII of the Civil Rights Act of 1968, the fair housing provision, expressed a sensitivity to the necessity of strong laws, both national and local, in seeking to secure an end to racial discrimination in housing. Section 815 of the Fair Housing Act, 42 U.S.C. §3615, provides that the Act will not limit or invalidate local efforts to maintain equal housing opportunity. Indeed, taken in light of the high priority Congress has placed on fair housing, *Trafficante, supra* at 211, local fair housing ordinances such as Willingboro's anti-for-sale-sign proliferation regulation, represent a canny method for local government to insure "truly balanced and integrated living patterns" *Trafficante, supra* at 211.

Local government's interest in fair housing objectives on behalf of its black and white citizens who live together

in harmony is a compelling one. It has been the communities themselves that have encouraged their own interracial stability. Exploitation by certain real estate interests is an overwhelming burden. Local efforts are essential to counteract the irresponsible and unlawful efforts of certain realty interests in inciting fear to accelerate listings through for-sale-sign proliferation. Willingboro's experience typifies other "open" suburbs which, by virtue of the exclusion of minorities by sister suburbs, have experienced rapid resegregation. From 1960 to 1973, Willingboro's white population increased only by three times; its black population increased over twelve hundred times.

Be it by direct segregative discrimination or by resegregative for-sale-sign proliferation, the factor igniting the result is race. "[W]hen racial discrimination herds men into ghettos . . . , then it too is a relic of slavery." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968). To guard against the recreation of a ghetto, sign proliferation regulation is critical because "[t]here is no difference in results between the traditional type of discrimination [or] exploitation of a discriminatory situation." *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 330 (7th Cir. 1974).

Under no circumstances other than in an exploitative market where actual choice is unavailable can such an unnatural and disproportionately racial occurrence prevail. The city may regulate "sophisticated as well as simple minded [devices of resegregation]." Cf. *Lane v. Wilson*, 307 U.S. 268, 275 (1939). Indeed, racial statistics tell the story of Willingboro and other racially transitional communities whose citizens seek to maintain the interracial associational rights and "integrated living patterns" which this Court in *Trafficante* found significant. As this Court has emphasized: "In cases of racial discrimination, statistics often tell much and courts listen." *State of Alabama v.*

United States, 304 F.2d 583, 586 (5th Cir. 1962), *aff'd* 371 U.S. 37 (1962). Willingboro's ordinance serves much of the purpose which the Act intends: prohibiting subtle behavior which can predictably result in racial resegregation. Cf. *United States v. Mitchell*, 327 F. Supp. 476 (N.D. Ga. 1971). *Mitchell* recognized that conduct which would be likely to convey to a reasonable man under the circumstances the idea that members of a particular race or color are or may be entering his neighborhood was unlawful. *Mitchell, supra* at 479. For-sale-sign proliferation in racially transitional communities does precisely that.

To take the next logical step, cities which are easy prey to some real estate interests, which thrive upon the segregative impact caused by for-sale-sign proliferation and "white flight" in order to secure listings, cannot sit idly by. Where, as in Willingboro, previous pervasive housing bias is much a part of its historical development, "[i]t is the *obligation* of the City to . . . aid in the integration of the housing patterns of the City *with all its strength*." *Banks v. Perk*, 341 F. Supp. 1175, 1185 (N.D. Ohio 1972), *aff'd in relevant part*, 473 F.2d 910 (6th Cir. 1973) [Emphasis added].

This Court's most recent pronouncement concerning standards to be employed in gauging equal housing opportunities may yet reflect how municipal conduct within the scope of the Fair Housing Act will be treated. In rejecting the sale discriminatory impact doctrine of the United States Court of Appeals for the Seventh Circuit in a constitutional challenge of a municipality's zoning practices, this Court concluded judicial deference should once again be exercised. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, No. 75-616, 42 U.S.L.W. 4073, 4076 (January 11, 1977). See generally *Euclid v. Ambler Realty, supra; Boraas v. Village of Belle Terre, supra*. Yet, however rational or considered the action by the village may

have been, this Court remanded the action to have the appeals court further consider whether or not, implicitly by discriminatory effect or otherwise, the zoning practices of the village violated various sections of the Fair Housing Act, *Arlington Heights, supra* at 4078.

By this standard, Willingboro's failure to preserve its interracially balanced character, permitting, by non-action, the resegregation by for-sale-sign proliferation, may in fact alone place the township in a posture of obstructing the very goal which the Fair Housing Act dictates and which the township itself seeks to attain. It is the interracially harmonious citizenry that pay the price of sign proliferation and ultimate resegregation.

III. For-Sale-Sign Regulation Does Not Restrict Constitutionally Protected Speech

While the petitioners, a realtor and property developer, portray their plight as one of an infringement of constitutionally protected speech, the Court of Appeals more accurately identified the realities and put the challenge in context:

> The interest of both the black and white citizens in stable communities outweighs any minor inconvenience of having to utilize alternative methods for advertisement and information gathering.

Linmark Associates, Inc. v. Township of Willingboro, P-H E.O.H. Rptr. ¶13,754, at 14,757 (3rd Cir. 1976). Rather than "expression" in its constitutional sense, petitioners have been using and continue to use a panoply of marketing devices. Indeed, the broker-petitioner conceded that most of his business, 70%, is secured by means other than by signs. Petitioner has, for example, effectively used newspapers, the limitation of which was of great concern to this

Court in *Bigelow v. Commonwealth of Viginia*, 421 U.S. 809 (1975). The utilization of newspapers by the petitioner was much like the attempted utilization which the petitioner in *Bigelow* sought to secure. Unlike *Bigelow*, however, this petitioner seeks to go beyond newspaper use, which is unlimited here, and claims that another sales device, signs in Willingboro's interracially sensitive boundaries, is additional "speech" protected under the First Amendment.

An examination of *Bigelow* suggests the opposite. "For sale" signs are purely commercial speech and convey information of interest only to a limited number of persons. Particularly coupled with the other solicitation devices employed by the petitioner, the purely commercial nature of the for-sale signs becomes abundantly apparent. A for-sale sign has only one purpose when used in a legitimate manner: to solicit and entice potential buyers. It does not do "[m]ore than simply propose a commercial transaction." *Bigelow*, *supra* at 821.

Unlike the newspaper advertisement for abortions protected in *Bigelow*, a for-sale sign does not contain "factual material of clear 'public interest'." *Id.* at 21. Also unlike *Bigelow*, a for-sale sign conveys information of possible interest only to potential buyers; it does not convey "information of potential interest and value to a diverse audience. . . ." *Id.* at 821. Neither does it convey opinion nor ideas. It is bare commercial solicitation and cannot be elevated to the constitutional protection afforded under the First Amendment. *Valentine v. Chretensen*, 316 U.S. 52 (1942). While *amicus curiae* concurs with the Court of Appeals below, Chief Judge Markey expressed it more graphically in characterizing petitioners' "[e]xaltation of . . . commercial . . . transactions, by equating them to the to the majestic status of the First Amendment." *Linmark Associates*, *supra* at 14,751.

It is noteworthy that the efforts to pursue for-sale-sign proliferation are often focused in racially changing areas where racial fears prevail and real estate agents converge like "[f]lies to a leaking jar of honey." *United States v. Bob Lawrence Realty*, 474 F.2d 115, 124, n.13 (5th Cir. 1973). *Bob Lawrence* upheld the constitutionality of the anti-blockbusting and anti-steering provisions of the Fair Housing Act, §804(e), 42 U.S.C. §3604(e) which bars sales of homes by racial inducement in the face of claims that such prohibitions obstructed First Amendment rights of a real estate company. Likewise in *United States v. Hunter*, 459 F.2d 205 (4th Cir. 1972), *cert. denied*, 409 U.S. 934 (1972), racial advertising proscriptions were held permissible and not violative of First Amendment rights. The Court of Appeals for the Fourth Circuit held that banning racially discriminatory advertising under §804(c) of the Fair Housing Act, 42 U.S.C. 3604(c), interfered with no constitutionally protected "speech."

Bigelow addressed the imposition placed on newspapers. Impairing the proper function of a newspaper smacks of First Amendment infirmities. Aiding a real estate firm to increase purely commercial activity in the exploitation of a racially sensitive market is not remotely comparable. Beyond that, such an "[a]rgument ignores current realities of racial psychology and economic practicalities." *Clark v. Universal Builders, Inc.*, *supra* at 331.

IV. For-Sale-Sign Proliferation Limitations Are an Essential Element in Maintaining Racial Balance

It is well within Willingboro's police power to address itself to the "pressing social need" of a balanced and integrated community. Cf. *Cornelius v. City of Parma*, *supra* at 743.

> The right to open housing means more than the right to move from an old ghetto to a new ghetto. Rather, the goal of our national housing policy is to 'replace the ghettos' with 'truly integrated and balanced living patterns' for persons of all races. Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 211. It is clearly consistent with the Constitution and federal housing policy for [the City of] Gary to pursue a policy of encouraging stable integrated neighborhoods and discouraging brief integration followed by prompt resegregation. . . .

Barrick Realty v. City of Gary, 491 F.2d 161 (7th Cir. 1974). While the City of Gary's sign proliferation regulation occurred at a time where the city was experiencing heavy resegregation, Willingboro's telling statistics of minority change from less than 1% to over 18% within thirteen years dictated an awareness of Gary's experience, but at the early stage. Many transitional, sensitive communities like Willingboro seek to stem the tragedy of ghettoization and preserve the precious American objectives of harmonious interracial living.

As one commentator suggests:

> If ghettoization of America's black citizens is a 'relic' of the slave system, then a compelling affirmative duty lies upon *all levels of government* to take measures to secure its *prompt eradication*.

Kinoy, *The Constitutional Right of Negro Freedom Revisited: Some First Thoughts on Jones v. Alfred H. Mayer Company*, 22 RUTGERS L. REV. 537, 551 (1968).

Black and white citizens in Willingboro, Cleveland Heights, Shaker Heights and other successful, harmonious communities believe sign-proliferation regulation is vital

to their future as models for American living. In terms of their government's role:

> [T]he prohibition of for sale signs [is] no less rationally related to [combatting resegregation], or to the ultimate objective of integration and social and economic stability than the prohibition of blockbusting activities.

Barrick Realty v. City of Gary, 354 F. Supp. 126, 135-136 (N.D. Ind. 1973). For-sale-sign proliferation has but a single message in racially changing areas: panic-pedalling. It causes instability which is bred on rumor, fear and hostility. Proliferation becomes another racial factor which influences choice. Where signs abound in such communities, the "freedom" to live in a balanced and integrated neighborhood is denied. Sign proliferation triggers an irreversible pattern of resegregation and of ghettoization:

> Where choice influencing factors such as race are not eliminated, freedom of choice in the purchase of real estate becomes a fantasy. . . .

Zuch v. Hussey, 394 F. Supp. 1028, 1047 (E.D. Mich. 1975).

It cannot remain the role of community organizations alone, as the progeny of *Trafficante*, to become the predominant element in the battle to achieve balanced and integrated housing conditions. As the Chief Judge of the United States District Court for the Northern District of Ohio wrote, relying on *Trafficante*:

> Plaintiff Heights Community Congress claims that it has been damaged in that 'the conduct of the [real estate firm] directly obstructs, frustrates and damages the congress in achieving its objective by impeding the processes which are used to benefit the entire community of Cleveland Heights. . . .'

Heights Community Congress v. Rosenblatt Realty, Inc., P-H E.O.H. Rptr. ¶13,702, at 14,475 (N.D. Ohio 1975).

This nation is unquestionably committed to fair housing as a fundamental element of a federalistic approach to housing and community development. See 42 U.S.C. §§5301, *et seq.* The role of local government, coupled with an active role of the United States and, significantly, white and black community groups vanguarding fair housing enforcement, is a paramount undertaking without which the predictions by the Kerner Commission may one day hold true: a nation racially divided into two nations, one black and one white. NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT 225 (1968). As residents in such communities, citizens themselves will bear the consequences of the benefits of an integrated society, *Trafficante, supra* at 208, or the ravages of a resegregated ghetto. The for-sale-sign proliferation regulation is a significant method in achieving the beneficial society which the Congress envisioned in the enactment of Title VIII and which this Court so lucidly recognized in *Trafficante.*

CONCLUSION

For the foregoing reasons, *amicus curiae* The Housing Advocates, Inc. urges this Court to affirm the holding of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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